(13)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 433

ALICE HOWE, AS EXECUTRIX OF THE ESTATE OF MARY E. B. HOWE, DECEASED,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved.

This petition is directed to a judgment of the Circuit Court of Appeals for the Seventh Circuit reversing the District Court and holding that the liquidation trust before the court involved gifts of future interests so that the gift tax exclusions contended for by petitioner would not be allowable, under the rule laid down in *U. S.* v. *Pelzer*, 312 U. S. 399.

The trust in question was created by Mary E. B. Howe for the benefit of her seven named children. Later, in 1937, she transferred additional property to the trust and in her gift tax return claimed seven exclusions of $5,000 each (R. 2 and 3). The Commissioner disallowed six of the seven exclusions. The donor accordingly paid under protest $2,768. This suit was brought to recover that sum, plus $147.50 interest.

The terms of the trust (R. 5-11), state that its general purpose is (R. 5)

> "to conserve the assets while present circumstances render it difficult or impracticable to distribute them and to place the assets as rapidly as practicable in condition for liquidation and distribution."

As to the time and manner of distribution of trust income and corpus the trust instrument provides (R. 8-9):

> 10. The Trustees shall, from time to time, distribute among the Beneficiaries such accumulated income as may in their judgment not be needed as a reserve for taxes and other obligations.
>
> 13. All distributions of liquid assets or cash, whether income or principal, shall be in equal shares between the Beneficiaries except that in case of the death of a Beneficiary, the share shall go to the heirs, legatees or devisees of such Beneficiary. • • •

The provision largely relied upon by opposing counsel as authorizing accumulation reads as follows (R. 6, 7):

> 4. Before binding the trust in any building program or other similar enterprise that may reasonably be expected to involve a total expenditure of over Three Thousand Dollars ($3,000.00), the Trustee shall give to each of the Beneficiaries ten (10) days' notice in writing of the nature of the proposal and in case a majority of the beneficiaries express in writing their disapproval within said ten (10) days, the Trustees shall not proceed therewith. • • •

As to final distribution, the instrument says (R. 8):

> 12. Upon a majority of the Beneficiaries or of the survivors of them joining in a written demand that the estate be closed and distributed, the Trustee shall comply with said demand within one year from the presentation thereof to the Trustees, but in any event such closing shall not be later than eighteen years after the death of the Donor.

Attached to the trust instrument and incorporated by reference is a printed excerpt from a Chicago Title & Trust Company form in common use embodying a conveniently broad statement of trustee powers.

Judgment was entered for the taxpayer in the sum of $2,915.58 plus interest (R. 37, 38).

The Circuit Court of Appeals reversed, its opinion being reported in 142 Fed. 2d 310. The Court (R. 58) quotes at length from the printed form just referred to, and later (R. 58) seems to attach importance to these printed "broad powers" as controlling the typed instrument. The opinion (R. 56) gave lip service to the statement in *Comr.* v. *Glos,* 123 Fed. 2d 548, 550, that the distinction between present and future gifts depends on whether there is a postponement of rights "which would be forthwith existent if the interest were present," but asserted that the critical question was whether the donees acquired an interest capable of present and "immediate" enjoyment.

Passing over the liquidation purpose, the court addressed itself (R. 57) to the "form" of the gift, particularly to the 18 year (maximum) duration, and imputed to us reliance on Par. 12 "to meet this long trust duration". It rejects our supposed argument and says that "it follows" that the gift is a future interest.

The opinion adopts (R. 58) a broad construction of the trustee powers under Par. 4, but does not reconcile this with the directions in Par. 10 to distribute income.

In conclusion, the court states (R. 59) that "the trustees' discretion * * * has all the legal earmarks of authority to accumulate income." The District Court is reversed.

Jurisdictional Statement.

This Petition is presented under Sec. 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347a). The judgment sought to be reversed was entered April 25, 1944 and the petition for rehearing was denied June 6, 1944.

Questions Presented.

1. Under the *Pelzer* case (312 U. S. 399) it is a proper statement of the rule to say that a gift must be "immediate" in order to be present?

2. Does a majority-vote power of the beneficiaries to prevent accumulation preclude an accumulation argument?

3. Does the fact that a liquidation purpose operates in opposite direction from accumulation, control trust powers that might otherwise be doubtful?

4. Can postponement inherent in the nature or condition of the assets be relied on for pronouncing a gift "future"?

5. Did Congress intend that gifts in trust might be pronounced "future" when the trust instrument creates no difficulty in valuing?

Reasons Relied On for Allowance of the Writ.

1. The Circuit Court of Appeals decision that a gift must be "immediate" in order to qualify for the exclusion is in conflict with all of the decisions in which gifts in trust have been held to be present, since in none of those cases was the gift "immediate".

Commissioner v. *Brandegee* (C. C. A. 1), 123 Fed. 2d 58.

Charles v. *Hassett* (D. C., Mass.), 43 Fed. Supp. 432.

Other cases are cited and summarized in C. C. H. Gift Tax Service, Secs. 3965.361 to .368 inclusive.

2. The holding that the gifts involve accumulation despite provisions for majority control involves misconstruction of and misapplication of *Ryerson* v. *U. S.*, 312 U. S. 405.

3. The Court's insistence that it must "look at the form" instead of construing the instrument in the light of the liquidation purpose is in conflict with the decisions in which the purpose has controlled close questions of construction. *Smith* v. *Comr.* (C. C. A. 8), 131 Fed. 2d 254.

4. In relying on obstacles to enjoyment inherent in the non-liquid condition of the assets the court fails to apply the rule that it purports to adopt from *Commr.* v. *Glos*, 123 Fed. 2d 548, 550, which rule limits future interests to those in which the postponement relates to interests "which would be forthwith existent" except for the postponement in the trust.

5. Since no element of contingency is involved and such postponement as is apparent in the trust is in fact inherent in the nature of the assets, the trust does not create a difficulty of valuing such as Congress had in mind in adopting the future interests wording.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Seventh Judicial Circuit be reversed, that the judgment of the District Court be affirmed and that petitioner be granted such other and further relief as may seem proper.

HERBERT BEBB,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The memorandum opinion of the District Court (R. 24), the findings of fact (R. 34), and the conclusions of law (R. 35) are printed in full in the record, but are not reported.

The opinion of the Circuit Court of Appeals is printed in full in the record (R. 54-59) and is reported in 142 Fed. 2nd 310. No opinion was filed upon denial of the petition for rehearing.

Jurisdiction and Statement of the Case.

The presentation of these in the preceding Petition is hereby adopted and made a part of this Brief.

Specifications of Errors.

The Circuit Court of Appeals erred:

1. In holding that a gift must be "immediate" in order to qualify for the gift tax exclusion.

2. In refusing to give effect to majority control as an answer to the accumulation argument.

3. In refusing to give effect to the liquidation purpose on questions of construction.

4. In relying, in its accumulation conclusion, on obstacles to enjoyment that were not created by the trust.

5. In refusing to give effect to the Congressional intent that future interests be limited to cases involving difficulty in valuing.

6. In holding that the trustees could use income for building construction.

7. In holding that the trust involved accumulation.

8. In reversing the judgment of the District Court.

Summary of Argument.

The "immediacy" test adopted by the Circuit Court of Appeals is unworkable and in conflict with decisions from other circuits. The definition of future interests in the Treasury Regulations needs clarification. The holding that our gifts involve accumulation despite majority power to prevent accumulation involves misapplication of this Court's Ryerson decision. The Circuit Court of Appeals insistence on looking "at the form" instead of at the liquidation purpose conflicts with other cases. To the extent that obstacles to present enjoyment are due to the non-liquidity of the assets, they have no weight in supporting the Circuit Court of Appeals' accumulation conclusion. The Howe trust does not create a difficulty in valuing which this Court in the Pelzer case held to be the primary test. The purpose of our gifts is present. The details are consistent with this purpose. Our Circuit Court of Appeals is squarely in conflict at all important points with the latest decision in the field. The confusion exhibited by the meaningless definition of future interests in the Treasury Regulations and by court adoption of conflicting tests calls for action by this court.

ARGUMENT.

I.

The "immediate enjoyment" test adopted by the court below is in conflict with all of the decisions in which gifts in trust have been held to be present.

The opinion of the Circuit Court of Appeals says (R. 57): "The critical question * * * is whether the donees * * * acquired an interest capable of present and immediate enjoyment or whether it was one 'limited to commence in use, possession, or enjoyment at some future date or time.'" The closing quote within the quote is from the Treasury Regulations. It amounts to defining a future interest as an interest that starts in future. Hence it adds nothing and can be ignored except as it demonstrates a need for clarification by this Court. It follows that *the* test adopted by the Court is that of "immediate enjoyment."

The fact that the adoption of immediacy as a test was not unimportant, or a mere matter of oversight, is demonstrated by the fact that it was argued pro and con. Opposing counsel quoted with approval passages seeming to require that a gift in order to be "present" must be "immediate," "unrestricted," "absolute" and "unconditional." We demanded (our Brief p. 28) that counsel either adopt these absolutes or abandon them. We said at p. 27:

> "The reason why counsel do not commit themselves is that each of these words applied in its ordinary sense would result in pronouncing *all* trusts to be future, contrary to the undeniable fact that if Congress had meant such a result it would have said so

and to the fact that many trusts have been held to be "present.' Consider, for example, the word 'immediate.' The primary meaning as given in the Oxford dictionary is 'not separated by any intervening medium.' This is applied to a person or thing in its relation to another. In this sense, all gifts in trust are 'mediate' in contrast with ordinary direct gifts which are 'immediate.' If we take the derivative meaning of 'occurring at once, without delay' we are again confronted with the difficulty that no trust can satisfy the word literally. Some delay is inevitable if only for the manual operations of receiving, making record entries, and distributing. We must conclude that what is meant is a Pickwickian immediacy. Similarly no beneficiary has 'unrestricted' rights in the trust res; he cannot go to the trustee's office, take away the securities and sell them. Even more clearly the rights of the beneficiary of an active trust are never 'absolute,' in fact the trouble with each of these words is exactly that they are absolute words and therefore unworkable as tests in a field that is shown by the holdings to be non-absolute. Opposing counsel's thinking would be straighter if they would try to use in their tests only words that can have general application."

Under these circumstances, it can hardly be said that the Court could have adopted immediacy as a test unless it was important to the Court's thinking and to the decision of the case.

While the word "immediate" was not employed in formulation of the test in *U. S.* v. *Pelzer,* 312 U. S. 399, it was employed in *Commissioner* v. *Gardner* (C. C. A. 7), 127 Fed. 2nd, 929, 931, and *Commissioner* v. *Lowden* (C. C. A. 7), 131 Fed. 2nd, 127, 128.

It is a matter of common knowledge of which we ask that this court take judicial notice that an abnormal proportion of tax cases are decided by the Circuit Court of

Appeals in favor of the Government, and that the belief is widely held that this is due to an agreement or understanding that the Government will appeal only selected cases, and the courts will accordingly give the Government the benefit of any doubt on cases that are taken up. We submit that such a procedure would involve a *pro tanto* abdication of the judicial function denying due process of law to the taxpayer. The situation is rendered additionally delicate by the fact that Circuit Court of Appeals judges depend for promotion in part on the good will of Government counsel.

We further submit that meaningless tests like "immediacy" would facilitate the supposed practice. Hence they encourage the belief above referred to. They contribute nothing to reasoning but lend an air of plausibility to decisions otherwise difficult to support. It is important that this court clarify the position that it took in the *Pelzer* case and lay down a workable test or tests that can displace these weasel words.

Since no gift in trust is "immediate" in either the original or the derivative meaning of the expression, it follows that the decision of our Circuit Court of Appeals is in conflict with all of the cases in which gifts in trust have been held to be present rather than future for gift tax purposes. See for example, *Commissioner* v. *Brandegee* (C. C. A. 1), 123 Fed. 2d 58, and *Charles* v. *Hassett* (D. C. Mass.), 43 Fed. Sup. 432. Other cases are cited and summarized in C. C. H. Gift Tax Service, Secs. 3965.361 to .368, inclusive.

II.

The holding that the gifts involve accumulation despite provisions for majority control involves misconstruction of and misapplication of Ryerson v. U. S., 312 U. S. 405.

As we understand it, the Circuit Court of Appeals admits that an absolute right of a single beneficiary to terminate a trust would be a complete answer to an accumulation argument. This was expressly conceded in the *Ryerson* case. The distinction attempted to be drawn is that the right to terminate our trust is dependent on majority action. Our Circuit Court of Appeals opinion says "This at once raises a contingency." Surely this betrays a shocking lack of confidence in the process relied on in a democracy for getting all kinds of business done.

The *Ryerson* case does not control ours since it did not involve majority action, and since there is a suggestion in the opinion in that case (p. 408) that "the joint power was not for the joint benefit of the donees of the power." In our case the power *was* for the joint benefit. All of the donees were in the same relationship to the trust and would have the same motives for desiring termination and for acting to that end.

In addition to the foregoing point that the majority control provisions *ipso facto* negate accumulation, they confirm the liquidation purpose of the donor, and thus contradict our Circuit Court of Appeals' hint in the "earmarks" passage (R. 59) that the trustees' discretion was a subterfuge to cover an intent to create an accumulation trust. If the donor had intended accumulation, she would not have inserted the majority control provisions.

III.

The court's insistence that it must "look at the form" instead of construing the instrument in the light of the liquidation purpose is in conflict with the decisions in which the purpose has controlled close questions of construction.

In all of the cases holding gifts to be future (See C. C. H. Gift Tax Service, Sec. 3965 and following) there was contingency as to the gift or there was an express direction to accumulate; the two grounds relied on in *U. S.* v. *Pelzer*, 312 U. S. 399. The Howe gifts are vested, not contingent (R. 8, 9, Par. 13), in seven named beneficiaries (R. 5) and there is no direction to accumulate. The Circuit Court of Appeals' finding of an incidental or implied power to accumulate (R. 58) runs counter to the liquidation purpose, and to the authorities summarized below giving effect to the purpose.

In the typical cases in which accumulation has been relied upon to support a "future interest" conclusion, the controlling motive of the donor has been to increase the future estate or to keep unneeded income out of the inexperienced hands of youthful beneficiaries. The Pelzer case is a clear cut example. The purpose has operated in the direction of taking money out of the present and putting it into the future. The liquidation purpose in our case is not merely distinguishable from all of these cases. It works in the *opposite* direction. It operates to transform non-liquid assets (that would normally be available only in future) into a fund available for present distribution.

The Circuit Court of Appeals in our case in no way meets these obviously sound and controlling points, but

tries (R. 57) to avoid them by manufacturing a "contingency". The court refers (R. 57) to the 18 year maximum life of our trust and assumes that we rely on the majority control provisions "to meet this long trust duration." Long duration was not the issue presented. It is true that we drew an analogy to the Thellusson acts in which long duration is of the essence, but the points of our analogy were that accumulation is involved in both fields and that in both the power of a beneficiary to take control demolishes any accumulation argument. No question of "long trust duration" is involved in our case nor in any of the gift tax authorities.

The court then mentions the majority power to terminate and says (R. 57) "This at once raises a contingency. * * * Certainly the right of each beneficiary to present enjoyment is contingent upon such majority action." This is an attempt to make a weapon out of a shield. We have argued that majority control gives us a shield against the accumulation point. The maximum result of an attack on majority control would be that we would lose that shield and the accumulation argument would need to be re-examined. Such a re-examination should give effect to the dominant purpose. In *Smith* v. *Commissioner*, 131 Fed. 2d 254, it was argued that the trustees had discretionary power to accumulate instead of educating the beneficiaries, but the court said "The discretion vested in the trustee was merely as to the means of executing the command of the settlor. It did not give the trustee authority to set aside the express purpose of the trust." Similarly in *Commissioner* v. *Lowden*, 131 Fed. 2d 127, it was argued that authority to delay income payments made the gift future, but the court overruled this argument on the ground that the purpose of the delay was "not to postpone vesting and enjoyment of income but to provide a convenient distribution procedure."

In holding (R. 58) that "there is nothing in the trust agreement [note that express authority is not claimed] precluding the trustees * * * from using the trust income" the court gives no effect to the fact that par. 10 (R. 8) directs the trustees to distribute income. The two passages can be harmonized. See our Petition for Rehearing (R. 69).

IV.

In relying on obstacles to enjoyment inherent in the non-liquid condition of the assets the court fails to apply the rule that it purports to adopt from Commissioner v. Glos, 123 Fed. 2d 548, 550, which rule limits future interest to those in which the postponement relates to interests "which would be forthwith existent" but for the postponement in the trust.

It is our position that, in absence of an issue being raised on this point, the recital in the trust preamble (R. 5) that it was "difficult or impractical to distribute" until the assets had been placed "in condition for liquidation and distribution" is to be taken at face value. In our Petition for Rehearing (R. 71) we presented an offer of further proof.

These difficulties referred to in the instrument mean that before the creation of the trust there were obstacles to present enjoyment analogous to the obstacles which, if *created* by a trust instrument, might make the interests future. Clearly such obstacles to enjoyment did not make the ownership "future" in the donor's hands. To the extent that she transferred her difficulties to the trustees, the boundary between present and future continued as it had been. Obstacles to enjoyment such as the need to devote the income of productive assets to the carrying of non-productive assets clearly would not make the gift future

if the trust instrument was silent on these points. Surely the mere fact that the instrument deals expressly with the liquidation difficulties does not alter the case. This is recognized in the passage quoted by our Circuit Court of Appeals (R. 56), from *Commr.* v. *Glos*, 123 Fed. 2d 548, 550 (emphasis ours):

> "The sole statutory distinction between present and future interests lies in the question of whether there is postponement of enjoyment of specific rights, powers or privileges *which would be forthwith existent* if the interest were present."

The present enjoyment of which our Circuit Court of Appeals is so tender would *not* be fully "forthwith existent" no matter what the wording of the trust might be.

V.

Since no element of contingency is involved and such postponement as is apparent in the trust is in fact inherent in the nature of the assets, the trust does not create a difficulty of valuing such as Congress had in mind in adopting the future interests wording.

In *U. S.* v. *Pelzer*, 312 U. S. 399, 403, this court said as to the term "future interests":

> "In the absence of any statutory definition of the phrase we look to the purpose of the statute to ascertain what is intended. * * * Its purpose was * * * the protection of the revenue and the appropriate administration of the tax immunity provided by the statute. It is this purpose which marks the boundaries of the statutory command. The committee reports recommending the legislation declared * * * 'the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts.' "

In our case the gifts are clearly vested (R. 5, 13) so that there is no difficulty in determining the donees. The value of the gift to each of the seven children is simply 1/7 of the total value of the trust assets. Our case does not come within the purpose that Congress had in mind when it adopted the "future interests" wording.

Our Circuit Court of Appeals has thus decided a federal question in conflict with the applicable decision of this Court.

The confusion evidenced by the definition of future interests in the Regulations as those "limited to commence * * * at some future date * * *" and by widespread adoption of unworkable words such as "immediate" is attributable in part to Government tactics illustrated in our case by the adopting in the Trial Court and in their Circuit Court of Appeals Brief, of the test of whether the gift is "limited by discretion". Counsel abandoned this test at the oral argument, but their persistence in adhering to a test that obviously is meaningless and has no acceptance in the cases prevented the type of careful analysis that would have been possible if the problem had been intelligently presented in the printed brief. Our examination of other Government lower court briefs in this field persuades us that it is the general policy to avoid showing the Government's hand. The briefs exhibit a technique of stating *ex cathedra* supposed legal principles and following the statements by groups of cases not separately analyzed. Where cases are given separate treatment, there is no statement of the facts, but merely a quotation of wording relied upon, stripped from its context. We respectfully suggest that these are tactics of confusion. The mere fact that such tactics have succeeded in other cases, and have temporarily succeeded in our case does not vindicate them. In the interest of the proper functioning of the courts, there should be as early and as complete a showing of the posi-

tion of each party as is practicable. We accordingly respectfully suggest that this court take appropriate steps to discourage this practice.

VI.

Our Circuit Court of Appeals decision is in conflict at almost every point with the most recent decision in the field.

In *Disston* v. *Commissioner* (C. C. A. 3), 13 L. W. 2049 (decided July 12, 1944 and not yet officially reported) a trust instrument authorized accumulation during minority. The court in holding that this did not render the gift "future" said that these facts "affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but * * * recognition by the donor of what the law, out of solicitude for safeguarding the minor's property, would have interposed in the absence of the donor's express direction * * *. The gifts were the property of the minor donees none the less; and so was the income which recurrently accrued thereon * * *. If the donees should die during their minority, the gifts and all accumulated income would pass as part of their respective estates. * * * Furthermore, for the purpose of determining the recipients of the gifts, the possession of the corpus was in the minor donees within the contemplation of the relevant provision of the Revenue Act."

"Nor did the authority to the trustees to use, in their sole discretion, the income from the gifts to the minors for their support and education during minority make the income from the gifts any less the minors' property. * * * The discretion thus reposed neither added to nor took away from the absoluteness of the gifts. * * *"

This case is so closely in point on several of the headings of our brief that we have reserved it to the end. For comparison we will treat the two cases and our comments in parallel columns.

	Disston	Howe	Our Comments
1.	Accumulation authorized	Our Circuit Court of Appeals says accumulation. We deny it.	Disston more "future" than Howe.
2.	Period during minority	Period 18 years unless majority acts.	Disston more "future" than Howe.
3.	"Identity of donees not affected".	Gifts vested in seven.	Cases alike.
4.	"Value of the gifts" not "affected" by the accumulation.	No valuing difficulty. See our V.	Alike.
5.	The trust "provision was but recognition by the donor of what the law * * * would have interposed".	Our trust was but recognition by the donor of what *economic* law would have interposed due to non-liquidity.' See our IV.	Alike.
6.	"Gifts were the property of the * * * donees none the less".	Our provisions similarly deprived the donees of nothing.	Alike.
7.	"and so was the income".	Our Circuit Court of Appeals says (and we deny) that income could be withheld (see our III). Even so, it was the property of the donees in the Disston sense.	Disston more "future" than Howe.
8.	On death "gifts and all accumulated income * * * part of * * * estates."	Corpus and income both vested.	Alike.
9.	"Possession of the corpus * * * was in the * * * donees." for purpose of Revenue Act.	Howe provisions similar.	Alike.
10.	"Authority * * * to use * * * income" * * * for the beneficiaries did not make the income any less the minor's property.	See 7 above.	Disston more "future" than Howe.

It is interesting and significant that the case confirms our position that

1. accumulation must be weighed in the light of the trust purpose,

2. an important test is whether the *value* of the gifts is affected.

3. "recognition" by the donor of the existing fact situation (Disston—minority; Howe-non-liquidity) does not make the gift "future."

Our Circuit Court of Appeals is squarely in conflict with the Circuit Court of Appeals for the Third Circuit on all of these points.

Conclusion.

The decision below is in conflict at numerous points with cases from other Circuits. The defining of "future interest," now in a state of confusion, presents an important question of federal law which should be settled by this Court.

Respectfully submitted,

HERBERT BEBB,
Attorney for Petitioner.

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the district court (R. 24–25, 33) are unreported. The opinion of the circuit court of appeals (R. 54–59) is reported in 142 F. 2d 310.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 25, 1944 (R. 60) and a petition for rehearing was denied June 6, 1944 (R. 75). The petition for a writ of certiorari was filed September 5, 1944. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a gift in trust for the donor's seven children, was a gift of future interests under Section 504 (b) of the Revenue Act of 1932, precluding allowance of an exclusion of $5,000 for each beneficiary.

STATUTE AND REGULATION INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 504. NET GIFTS.
>
> (a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.
>
> (b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purpose of subsection (a), be included in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 ed.):

> ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, re-

mainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. For the valuation of future interests, see subdivision (7) of article 19.

STATEMENT

In 1935, Mary E. B. Howe created a trust for the benefit of her seven children, and in 1937, she transferred additional property to this trust which was reported on her gift tax return at a valuation of $33,500. No tax was shown, however, because seven exclusions totaling $35,000 were claimed. The Commissioner of Internal Revenue disallowed six of the seven exclusions,[1] and assessed a

[1] Since *Helvering* v. *Hutchings*, 312 U. S. 393, had not yet been decided, the Commissioner took the view that the trust, not the beneficiary, was the donee. But after that decision was rendered, he adopted the position that the gifts were of future interests and that no exclusions were allowable. However, as the statute of limitation has run as to the exclusion allowed, only six are now actually involved.

tax of $2,768.08. This sum plus interest was paid by the donor under protest and a claim for refund was filed but was rejected on May 5, 1941. The donor died on January 24, 1942, and the petitioner, as executrix, filed this suit to recover the tax (R. 2–3, 4, 16).

The trust agreement, which is set out as Exhibit "A" to the complaint (R. 5–11), provides that its general purpose is (R. 5)—

> to conserve the assets while present circumstances render it difficult or impracticable to distribute them and to place the assets as rapidly as practicable in condition for liquidation and distribution.

The trustees are given legal title to the personal and real property transferred by the donor and are given "the broadest possible power in the holding, management and sale of the property" (R. 6). But the trust powers are qualified by the provision that before binding the trust in any building program which will involve a total expenditure of more than $3,000, the trustees are required to give the beneficiaries ten days' notice, and, in case a majority expresses disapproval, the trustees are not to proceed (R. 6–7).

As to the time and manner of distribution of trust income and corpus the trust instrument provides (R. 8–9):

> 9. The Trustees may, in their discretion, arrange on what they regard as suitable terms for individual withdrawals of non-

liquid assets and for the charging of such withdrawals in an equitable manner against subsequent distribution of income and principal.

10. The Trustees shall, from time to time, distribute among the Beneficiaries such accumulated income as may in their judgment not be needed as a reserve for taxes and other obligations.

11. The owners of the beneficial interests shall have no power of anticipation or assignment *inter vivos* of any income or principal to be paid to them and the same shall be paid only to them personally and not to any other person by reason of any transfer or assignment of any prospective right to receive the same, or by reason of operation of law. In the event that any one of them shall voluntarily or involuntarily, or by operation of law be barred from receiving the payment thereof and applying same to his or her own uses, same shall be payable to his or her spouse, if any then living with him or her, and if none, then such payment shall be applied by the Trustees toward the care, support and maintenance of the owner in question and his or her family. The provisions of this paragraph shall be applicable to payments due to minors so that the Trustees shall in effect act as guardians during the minority of minor heirs of a deceased Beneficiary, but in no event shall the Trustees accumulate income after the date for final closing.

> 12. Upon a majority of the Beneficiaries or of the survivors of them joining in a written demand that the estate be closed and distributed, the Trustees shall comply with said demand within one year from the presentation thereof to the Trustees, but in any event such closing shall not be later than eighteen years after the death of the Donor.
>
> 13. All distributions of liquid assets or cash, whether income or principal, shall be in equal shares between the Beneficiaries except that in case of the death of a Beneficiary, the share shall go to the heirs, legatees or devisees of such Beneficiary. The discretion of the Trustees shall control as to the values to be assigned to various assets for the purpose of distribution.

The District Court found that the trust instrument provided gifts of present rather than future interests; that it was the intention of the donor that the gifts should vest in the donee-beneficiaries at once; that the donees were certain and the interest of each was certain; that the purpose of the trust was to conserve the assets and prepare them for liquidation and distribution; that the trust instrument contained no express power to accumulate; that any implication of power to accumulate is rebutted by the liquidation purpose, by the direction to distribute income, and by the power of a majority of the beneficiaries to block large improvements and to force final distribution; that the trustees were to act

merely as business managers for the beneficiaries; and that the direction to distribute income from time to time means at reasonable intervals (R. 34).

Accordingly, the District Court decided that the gift tax deficiency for 1937 was erroneously and illegally assessed against petitioner's testatrix and that the petitioner was entitled to recover the sum of $2,915.58 with interest thereon at the rate of five percent per annum from February 24, 1939 (R. 35).

The circuit court of appeals reversed the judgment of the district court and denied the petition for rehearing (R. 60, 75).

ARGUMENT

Section 504 (b) of the Revenue Act of 1932 provides for the exclusion of the first $5,000 of a gift to any person except as to gifts of future interests. Such interests are defined in Article 11, Treasury Regulations 79, as including estates, whether vested or contingent, which are limited to commence in use, possession or enjoyment at some future time. This definition was approved in *United States* v. *Pelzer,* 312 U. S. 399, and it has been interpreted to cover not only gifts which are limited to commence at a definite future time but also gifts qualified by, or dependent upon, the discretionary powers of a trustee. *French* v. *Commissioner,* 138 F. 2d 254 (C. C. A. 8th); *Welch* v. *Paine,* 130 F. 2d 990 (C. C. A. 1st); *Commissoner* v. *Gardner,* 127 F. 2d 929 (C. C. A.

7th); *Commissioner* v. *Brandegee,* 123 F. 2d 58 (C. C. A. 1st). See also *Commissioner* v. *Wells,* 132 F. 2d 405 (C. C. A. 6th); and *Helvering* v. *Blair,* 121 F. 2d 945 (C. C. A. 2d).

The court below held that the gifts here are dependent upon the discretionary powers of the trustees and so are gifts of future interests. Its conclusion is amply supported by the provisions of the trust instrument. The trustees are authorized to make distributions "from time to time" to the beneficiaries from "such accumulated income as may in their judgment not be needed as a reserve for taxes and other obligations" (R. 8). What such other obligations may include is indicated by the extremely broad powers given the trustees not only to improve, manage, lease, and subdivide the property, but also "to donate, to dedicate, to mortgage, pledge or otherwise encumber said property" (R. 9). In regard to any "building program," the trustees may incur expenditures up to $3,000, and may also spend sums in excess of that amount unless a majority of the beneficiaries forbid (R. 6–7). Thus, even if the gifts of income can be treated as gifts to any extent of present interests, there is no evidence of their value, and, therefore, no exclusions as to gifts of such income can be allowed. See *Commissioner* v. *Brandegee,* 123 F. 2d 58 (C. C. A. 1st), and *Helvering* v. *Blair,* 121 F. 2d 945 (C. C. A. 2d).

The trust, although purportedly created for liquidation, may continue for eighteen years beyond the death of the donor unless a majority of the beneficiaries vote for earlier termination, and the beneficiaries have no power to anticipate or assign any income or principal to be paid them. Prior to termination, the trustees may, but only in their discretion, arrange the terms for withdrawals of nonliquid assets (R. 8). Obviously, such discretionary powers make both the time of distribution and the amounts to be distributed uncertain. Consequently the beneficiaries do not have the immediate and absolute enjoyment which is a prerequisite to the making of a gift of a present interest.

There is only one trust provision permitting distribution of the estate which is not conditioned upon an exercise of the trustees' discretion. Paragraph 12 of the indenture requires that the estate be distributed upon demand of a majority of the beneficiaries (R. 8). As the court below held, this majority demand is a contingency even more speculative than that involved in *Ryerson* v. *United States,* 312 U. S. 405, where a gift in trust of half the corpus to each donee, conditioned upon a joint request for termination of the trust, was held a gift of a future interest.

However, the decision here is alleged to be in conflict with *Disston* v. *Commissioner* (C. C. A. 3d), decided July 12, 1944 (C. C. H. Inheritance,

Estate and Gift Tax Service, par. 10, 132). In that case, gifts of trust income to minor children were held to be gifts of present interests. Although the trustees were authorized to accumulate such trust income to the extent that they might decide it was not needed for the education and support of the children, the court held that a minor's legal disability precluded him from receiving the income in hand currently and that the arrangement followed in the trust was the proper, if not the only, way to make gifts of such interests to minors. While the Government is preparing to file a petition for a writ of certiorari in the *Disston* case because of a conflict with *Fondren* v. *Commissioner,* No. 88, this Term, the *Disston* reasoning is confined to gifts to minors and hence is not applicable here. Here it does not appear that the donees are minors, and, from all that does appear, they are legally capable of receiving their gifts immediately. Consequently, as the trust provisions could actually prevent enjoyment of the income or corpus by the donees in this case for more than eighteen years, the gifts fall in the category of gifts of future interests, and are made under terms similar to gifts which have been so classified in other cases, particularly in *Commissioner* v. *Brandegee,* 123 F. 2d 58 (C. C. A. 1st), and *Ryerson* v. *United States,* 312 U. S. 405.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions . The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 433

ALICE HOWE, AS EXECUTRIX OF THE ESTATE OF MARY E. B. HOWE, DECEASED,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

The brief for the United States in opposition to our Petition for Certiorari makes no attempt to sustain the Circuit Court of Appeals "immediate enjoyment" test. See our Petition, page 9.

The Government's readoption (p. 7) of the qualified-by-discretion test, which they had abandoned at the oral argument, is a confession that they can find in the decided cases no workable test, and hence that it is necessary for this court to clarify the definition of "future ~~intents~~." See our Petition, page 17.

The Government's statements at page 8 have been covered by our Petition. The trustees are not merely "authorized" to distribute income; the trust instrument (Par. 10, R. 8) says they "shall" distribute. From time to time means at reasonable intervals (R. 68, 69). The Government's attempt (middle of p. 8) to distort "other obligations" relies on printed provisions (See our Petition, p. 3, R. 9) that on familiar canons of construction should be regarded as controlled by the typed provisions. The "building program" (foot of Government's p. 8) must be considered in the light of majority control and of the liquidation purpose (See our Petition pp. 12 and 13). No necessity for separate valuing of income now appears, (R. 68) but if such evidence should become material the case should be remanded for that purpose. On the *Ryerson* case, (referred to by the Government, p. 9) see our Petition, page 12.

The opposing brief says at page 10, "While the Government is preparing a petition for writ of certiorari in the Disston case because of a conflict with *Fondren* v. *Commissioner,* No. 88 this Term, the Disston reasoning is confined to gifts to minors and hence is not applicable here." We agree that there is conflict between Disston (CCA 3, July 12, 1944, not yet reported) and Fondren (CCA 5, 141 Fed 2d 419). We do not agree that "the Disston reasoning is confined to * * * minors."

It is our position that the conflict between Disston and Fondren involves points that are involved in Howe and that the Government in asserting the Disston-Fondren conflict is in substance conceding that certiorari should be granted on Howe so that the cases may be considered together.

In our Petition, page 19, we demonstrated in parallel columns a ten-point correspondence between Disston and Howe. The Government's naked observation that "the Disston reasoning is confined to gifts to minors" does not meet our ten points of correspondence. The Disston court did not say that it was making a special rule for minors. It emphasized (no. 4 on p. 19 of our Petition) the fact that the "value of the gifts" was not affected and (our no. 5) the fact that the trust merely recognized what the law "would have interposed." In both cases it was applying rules that are not limited by the boundary between minority and legal age.

The value point traces back to the statement of Congressional intent quoted from *U. S.* v. *Pelzer*, 312 U. S. 399, in our Petition, page 16. Where the supposed obstacles to enjoyment are for the benefit of the *cestuis*, the value to the *cestuis* is not reduced. Hence the trust does not create a future interest under the value test. This point transcends the minority cases. It applies with full force to the Howe case.

The Disston statement that a trust is not "future" merely because it recognizes "what the law * * * would have interposed," is similarly not limited to the infancy field. The principle back of the statement is that the purpose of Congress was to discriminate against future interests *created by the trust*. In our case, as in the Disston case, there are obstacles to the *cestuis'* enjoyment independent of the trust. (Our Petition, p. 15.)

In Fondren, the majority opinion merely cites some of the cases cited in the Howe CCA briefs without giving any further clue as to the ground of decision. The dissenting opinion, however, says, "These children were given the fullest use, possession and enjoyment that was possible sensibly to confer upon children of such tender age. If the reasoning * * * is correct, then there could never be a substantial gift to a baby except a gift of a future interest." This implies that the cleavage between the Fondren judges was on the same lines as that between the government's cases and our cases. The question which cries for solution is whether the courts will look at the purpose of trust clauses having a future aspect (as was done in *Lowden,* 131 Fed. 2d, 127) and at the legal and economic background (Disston, ...; Fondren, dissent; Howe, District Court, R. 24); or will "look to the form" (Howe, CCA opinion, R. 57); Fondren, majority; and other cases cited by the Government).

The Government ignores points III, IV and V (pages 13 to 17) of our Petition, while we have answered all points that the Government has made.

Respectfully submitted,

HERBERT BEBB,
ARNOLD R. BAAR,
Attorneys for Petitioner.

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MOTION.

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MOTION.

The Petitioner moves that the order of February 5, 1945, denying certiorari in this cause be vacated, and that action of this Court on the Petition for Certiorari be held in abeyance until decision of *Disston* v. *Commissioner*, No. 589, in support of which motion she offers the attached suggestions.

ARNOLD R. BAAR,
HERBERT BEBB,
Attorneys for Petitioner.

SUGGESTIONS IN SUPPORT OF MOTION.

1. This Court on February 5, 1945, entered orders granting certiorari in Disston (No. 589) and denying in Howe (No. 433).

2. The similarity of the two cases is demonstrated in our Petition, p. 19, where we list, in parallel columns, ten points of correspondence.

3. We recognize the possibilities that (1) the reason for the contrast in the orders may be that the decision appealed from was against the Government in Disston and in favor of the Government in Howe and (2) that this Court may have virtually decided to reverse Disston.

4. The possibility remains that the Disston briefs and argument may convince this Court that where the elements of futurity relied upon are inherent in the fact situation the instrument cannot be charged with creating a future interest, or may otherwise lead to a sustaining of Disston.

5. The cases are so similar that, if Disston is sustained, the Howe Petition for Certiorari ought to be weighed in relation to that decision.

6. Since the Howe tax has been paid (R. 3) no element of disadvantage to the Government is involved in our proposal.

Respectfully submitted,

ARNOLD R. BAAR,
HERBERT BEBB,
Attorneys for Petitioner.